

Occupational Diseases Due to Toxic Exposure

Legal Issues

The Statute

- * 287.200.4. For all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total disability or death, benefits in this chapter shall be provided as follows: . . .
- * (2) For occupational diseases due to toxic exposure, but not including mesothelioma, an amount equal to two hundred percent of the state's average weekly wage as of the date of diagnosis for one hundred weeks paid by the employer; and
- * (3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:
 - * **(a) For employers that have elected to accept mesothelioma liability under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer or group of employers such employer is a member of. Employers that elect to accept mesothelioma liability under this subsection may do so by either insuring their liability, by qualifying as a self-insurer, or by becoming a member of a group insurance pool . . .
 - * **(b) For employers who reject mesothelioma under this subsection, then the exclusive remedy provisions under section 287.120 shall not apply to such liability. The provisions of this paragraph shall expire on December 31, 2038; . . .

Issue One

Does a policy at the time of last exposure provide coverage for enhanced benefits in mesothelioma claims?

The Relevant Statutory Provisions

- * **287.200.4** – For all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total disability or death, benefits in this chapter shall be provided as follows: . . .
 - (3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:
 - ** (a) For employers that have ***elected to accept mesothelioma liability*** under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer or group of employers such employer is a member of. ***Employers that elect to accept mesothelioma liability under this subsection may do so*** by either ***insuring their liability***, by qualifying as a self-insurer, or by becoming a member of a group insurance pool . . .
- * **287.280.1** – Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure their ***entire liability*** under the workers' compensation law. (emphasis added)

Issue Two

Does a policy at time of last exposure provide coverage for enhanced benefits in the other occupational disease due to toxic exposure claims?

The Relevant Statutory Provisions

- * 287.200.4. For all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total disability or death, benefits in this chapter ***shall be provided*** as follows: . . .
- * (2) For occupational diseases due to toxic exposure, ***but not including mesothelioma***, an amount equal to two hundred percent of the state's average weekly wage as of the date of diagnosis for one hundred weeks paid by the employer;. . .

Issue Three

Does the last exposure rule still determine employer liability in mesothelioma claims?

The Relevant Statutory Provisions

- * **287.063.2.** The **employer liable** for the compensation in this section provided shall be ***the employer in whose employment the employee was last exposed to the hazard of the occupational disease*** prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.
- * **287.200.4.** For all claims filed on or after January 1, 2014, for occupational diseases due to toxic exposure which result in a permanent total disability or death, benefits in this chapter shall be provided as follows: . . .
- * (3) In cases where occupational diseases due to toxic exposure are diagnosed to be mesothelioma:
- * ****(a)** For **employers** that have elected to accept mesothelioma liability under this subsection, an additional amount of three hundred percent of the state's average weekly wage for two hundred twelve weeks shall be paid by the employer or group of employers such employer is a member of. . .

Issue Four

Does an employer have subrogation rights for third party civil claims in a claim for occupational disease due to toxic exposure?

The Relevant Statutory Provisions

- * **287.150.7** – ***Notwithstanding any other provision of this section***, when a third person or party is liable to the employee, to the dependents of an employee, or to any person eligible to sue for the employee's wrongful death as provided in section 537.080 ***in a case where the employee suffers or suffered from an occupational disease due to toxic exposure*** and the employee, dependents, or persons eligible to sue for wrongful death are compensated under this chapter, ***in no case shall the employer then be subrogated*** to the rights of an employee, dependents, or persons eligible to sue for wrongful death against such third person or party when the occupational disease due to toxic exposure arose from the employee's work for employer.
- * **287.020.11** – For purposes of this chapter, “occupational diseases due to toxic exposure” shall only include the following: ***mesothelioma, asbestosis***, berylliosis, coal worker's pneumoconiosis, bronchiolitis obliterans, ***silicosis***, silicotuberculosis, manganism, acute myelogenous leukemia, and myelodysplastic syndrome.

Issue Five

Does the statute of limitations reset upon an employee's date of death?

The Relevant Statutory Provisions

- * **287.063.3** – The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that ***an injury*** has been sustained related to such exposure. . .
- * **287.430** – Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of ***injury or death***. . .

Issue Six

What is the claimant's burden of proof on “exposure” to asbestos and other toxic chemicals and substances?

The Relevant Statutory Provisions

- * 287.063.1 – An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists. . .
- * *Barr v. Vickers*, 648 S.W.2d 577, 580 (Mo. App. S.D. 1983) – “While the claimant does not sustain his burden by showing a possibility that he was exposed to the hazard of silicosis, his burden is satisfied if he shows a reasonable probability that he was exposed and such a probability is a sufficient basis for the commission to find for him. ‘Probable’ means that it appears to be found in reason and experience which inclines the mind to believe, but leaves room for doubt.” (internal citations omitted).